COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1123

EVELYN SANTIAGO

vs.

TERENCE DOORLY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this medical malpractice action, the plaintiff asserts that the defendant neurosurgeon negligently performed a spinal fusion operation and mispositioned some hardware in her spinal column, causing her serious injury. The case was dismissed on summary judgment, after the plaintiff failed to adduce any expert testimony in support of her claims. We affirm.

Background. The defendant, Dr. Terence Doorly, operated on the plaintiff, Evelyn Santiago, on February 10, 2011. Prior to the operation the plaintiff had come to the defendant with a large disc herniation in her spine at C5-C6, with attendant symptoms including pain radiating down her right arm. The plaintiff is a licensed registered nurse. The defendant performed a spinal fusion, including the placement of a cervical plate.

After the surgery the plaintiff continued to have significant pain and other symptoms, including weakness in her left arm and generalized upper body weakness. The plaintiff was treated for these postoperative symptoms by at least two other physicians -- first by Dr. Kelly Pajela, during 2011-2012, and then by Dr. Richard Ozuna, in 2012. Dr. Ozuna determined that one of the screws for the cervical plate placed by the defendant was "malposition[ed]" in the "C4-C5 disk space." Accordingly, in July of 2012 Dr. Ozuna operated, removed the cervical plate and screws, and then apparently replaced the hardware for the plaintiff's spinal fusion.

The plaintiff filed this negligence action against Doorly in June of 2015.[1] The plaintiff claims that she is totally disabled as a result of Doorly's malpractice. During discovery the plaintiff was asked to disclose any expert opinion that she intended to rely on, and she disclosed no such testimony. In March of 2018 the defendant moved for summary judgment, arguing in part that absent expert testimony the plaintiff could not show (1) that Doorly failed to meet the requisite standard of care, and (2) that the plaintiff's injuries were caused by Doorly's alleged negligence. The plaintiff did not timely

[1] The medical malpractice tribunal (G. L. c. 231, § 60B) concluded that the plaintiff's offer of proof did not contain sufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry.

oppose the summary judgment motion, and it was allowed on April 2, 2018.

The day after summary judgment entered, on April 3, 2018, the plaintiff filed a document entitled "Motion of the Plaintiff, Evelyn Santiago, for Opposition to File Motion for Summary Judgement" (plaintiff's motion for opposition). The plaintiff's motion for opposition and accompanying papers acknowledged that the plaintiff did not have any expert opinion to support her claims. The judge treated the plaintiff's motion for opposition as a motion for reconsideration, and denied it. This appeal followed.

Discussion. The plaintiff concedes that she has no supporting expert opinion but contends that negligence by Doorly can be inferred solely from the medical records, some of which were presented with her motion for opposition. Alternatively, in her appellate brief the plaintiff contends that "as a Licensed Practical Nurse," she "qualif[ies] as an expert" who could provide an opinion in support of her claims.

We cannot agree that the plaintiff's submission is sufficient to avoid summary judgment. A plaintiff in a medical malpractice case bears the burden to prove, among other things, that the defendant physician breached the applicable standard of care, and that the physician's breach was the cause of the plaintiff's injuries. Palandjian v. Foster, 446 Mass. 100, 104

(2006). Expert testimony will be required in the vast majority of cases to prove these elements. The Supreme Judicial Court has stated that "[i]t is only in exceptional cases that a jury instructed by common knowledge and experience may without the aid of expert medical opinion determine whether the conduct of a physician toward a patient is violative of the special duty which the law imposes as a consequence of this particular relationship" (citation omitted). Forlano v. Hughes, 393 Mass. 502, 507 (1984).

This case is not the exceptional case where expert testimony is not required. The discipline at issue is neurosurgery -- which includes operation on the spine and central nervous system. The notes of the medical providers, standing alone and without elaboration, do not suffice to allow a lay jury to conclude that the defendant neurosurgeon did not meet the applicable standard of care, or that the plaintiff's injuries were causally related to any negligence. Indeed, there is no evidence defining the applicable standard of care. There is no explanatory evidence of what the operation at issue entailed, how difficult or easy it was to perform, what the expected outcome was, or whether the outcome for the plaintiff was outside that expected range. None of the treating

physicians who saw the plaintiff after the operation by Doorly was deposed, or submitted affidavits.[2]

The lack of expert opinion as to causation is an even greater hurdle than the lack of evidence of negligence. Without expert guidance, a lay jury do not have the knowledge to determine whether the placement of a screw in the disc space at C4-C5 was the cause of the various ailments that the plaintiff contends led to her being totally disabled. See Harlow v. Chin, 405 Mass. 697, 702 (1989) (expert testimony is generally required to prove causation in a medical malpractice case). There is thus no basis in the summary judgment record for concluding that the plaintiff can prove causation.

Finally, we cannot agree with the plaintiff's contention, made for the first time on appeal, that she has the training and expertise to provide the required expert testimony as to the medical issues presented by her claims. "'The crucial issue,' in determining whether a witness is qualified to give an expert opinion, 'is whether the witness has sufficient "education, training, experience and familiarity" with the subject matter of the testimony.'" Commonwealth v. Frangipane, 433 Mass. 527, 533 (2001), quoting Commonwealth v. Richardson, 423 Mass. 180, 183

[2] The plaintiff points out that Dr. Ozuna's notes describe one of the screws as "malposition[ed]" when he treated the plaintiff in 2012. The word does not suffice to establish that Doorly was negligent when he operated on the plaintiff, and placed the plate, in 2011.

(1996). While the plaintiff is no doubt knowledgeable and experienced as a registered nurse, she is neither a medical doctor nor an expert in the central nervous system.

Judgment affirmed.

By the Court (Maldonado, McDonough & Englander, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: July 24, 2019.

[3] The panelists are listed in order of seniority.